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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

LAMAR AUBREY,

Defendant and Appellant.

F056254

(Super. Ct. No. VCF177929)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Marcia A. Fay, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Vartabedian, Acting P.J., Wiseman, J. and Poochigian, J.

A jury convicted appellant, Lamar Aubrey, of infliction of corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)) and assault with a deadly weapon (§ 245, subd. (a)(1)). On appeal, Aubrey contends the court committed instructional error. We will affirm.

FACTS

The Prosecution Case

E.D. testified that Aubrey was her ex-boyfriend and that they had a three-year-old child together. On December 17, 2006, E.D. was living with Steve Porchia and his family in Visalia. At approximately 6:00 p.m., Aubrey was at the Porchia residence and tried to speak to E.D. in the kitchen. E.D. told him she did not want to talk. Aubrey then pulled her to the ground by her hair and began punching her on her face and head. Aubrey stopped punching E.D. when Porchia walked in the house, but continued the assault when Porchia walked into his bedroom. E.D. went into Porchia's room and tried to call 911 but was too afraid because Aubrey followed her. She went back in the living room and was trying to find her keys when Aubrey picked her up by the hair and slammed her head on a glass table. At that point, Porchia's son, Patrick, pinned Aubrey against a wall and E.D. was able to run to the neighbor's house to ask for help. E.D. suffered a large bruise on her forehead, a large knot on her head, a busted lip, and two black eyes as a result of the assault.

In 2000, while E.D. was driving, Aubrey became upset with her and punched her in the face, leaving her unable to eat solid food for three days.

During an incident in 2001, while she was studying for college exams, Aubrey ripped up one of her textbooks. He also grabbed her by the neck and threw her across the room.

In 2005, when she was six months pregnant with their son, Aubrey "body slammed" E.D. on the floor during an argument.

During cross-examination, E.D. conceded that on a few occasions she hit Aubrey without Aubrey getting physical with her first. One time she pushed Aubrey when she

found him in bed at a woman's house. On another occasion she threw a can of vegetables at Aubrey during an argument. Once she chased Aubrey with a broomstick because he had hit her. On another occasion she sprayed water sealant under the door to the room where Aubrey was because he had broken her phone. E.D. denied ever threatening to kill Aubrey. She admitted having jokingly told Aubrey she was going to cut off his penis.

Porchia testified that on December 17, 2006, when he arrived home from work, he saw Aubrey standing over E.D., punching her. The beating stopped when Porchia screamed, "What's going on?"

Patrick Porchia testified that on December 17, 2006, he was in his room when he heard arguing. He walked out of his room and saw Aubrey hitting E.D. The fighting stopped temporarily when his father came in the house. Patrick returned to his room but soon heard fighting again. He then came out of his room and pushed Aubrey against the wall, allowing E.D. to leave the house. Patrick saw Aubrey slam E.D.'s face into a coffee table.

Miranda Raycraft testified that on December 17, 2006, she called 911 after E.D. came over to her house yelling that her boyfriend had slammed her face against the kitchen table.

Visalia Police Detective Brian Young took pictures of the house on December 17, 2006. He did not see, or take pictures of, a knife.

The Defense Case

Aubrey testified that on December 17, 2006, he and E.D. began arguing because E.D. wanted Aubrey to take care of their son. After E.D. hit Aubrey in the face, he reminded her that the previous week he warned her the next time she put her hands on him, he was going to call the police. He also told her that he was going to put her in jail, take custody of their son, and leave her.

As Aubrey picked up a phone in the kitchen to call the police, E.D. came at him with a knife in her hand raised over her head. Aubrey grabbed her arm and her hair and took her to the ground. Aubrey and E.D. continued to struggle and he was able to take

the knife from her and throw it out of the way. E.D. was swinging at Aubrey, trying to hit him and get the knife, so Aubrey started hitting her to prevent her from getting it. Steve Porchia walked in at that time, told them to break it up, and then left. E.D. attempted to run back into the kitchen and Aubrey picked her up and swung her around. They both tripped and she landed on the table. At that point, Patrick Porchia grabbed him, and E.D. ran from the residence. Aubrey thought E.D. would kill him if she got hold of the knife again because she had threatened him numerous times. E.D. had told Aubrey that 16 years earlier, when she was 12, she killed her sister.

Aubrey denied ever hitting E.D. in the jaw, leaving her unable to eat for three days. According to Aubrey, there were occasions when E.D. would pull the steering wheel of the car he was driving to try to get him to wreck it. On one of these occasions, while driving down Highway 99, E.D. grabbed the steering wheel and caused the car to go from the fast lane into the median. After he got back on the highway and she tried to do it again, all he did was hit her with the back of his hand to make her stop.

Aubrey also denied ever tearing up E.D.'s textbooks. According to Aubrey, one day while arguing with E.D., she threw some remote controls outside the house. Aubrey retrieved them but had to reenter the house through the kitchen window because E.D. had locked the door. After E.D. threw the remotes out a second time, he threw her textbook outside. Aubrey again retrieved the remotes and was entering the house through the kitchen window when she hit him in the face with a broomstick. !(RT: 262.)! Once inside the kitchen, Aubrey pushed E.D. hard to get her off him because she was trying to hit him. He also cut his hands when he tried to take a knife away from her. Although E.D. called the police, neither she nor Aubrey was arrested that day.

The argument during which E.D. sprayed a substance under a door began after Aubrey brought home a cell phone he found at work. E.D. thought it belonged to another woman, and argued with Aubrey that night even after Aubrey went to bed. Aubrey then grabbed a pillow, went to the computer room to sleep, and locked the door. E.D. banged on the door for a while and then left. Aubrey then heard a hissing sound and smelled

fumes. As he got out of the room, E.D. started swinging the can at him. Aubrey grabbed her by the shirt and wrestled with her until he was able to take the can from her. Aubrey denied body slamming her that night. However, he was arrested the day of that incident.

Aubrey further testified that E.D. hit him on numerous occasions with a broomstick. E.D. also told Aubrey that if she caught him sleeping with Watson, she would cut off his penis.

Aubrey's sister, Lene Aubrey, testified that in March of 2005, she was living with Aubrey. One night she was awakened by banging noises. She came out of her room and saw E.D. spraying something under the door of the room that Aubrey was in. When Aubrey came out of the room, E.D. began swinging the can at him. Aubrey picked her up by the shirt with one hand and pushed her against a wall as he took the can from her. Aubrey did not hit E.D. or slam her on the floor. E.D. was the aggressor that night.

Josephina Lewis babysat Aubrey's son. One night a woman named Monica called Lewis asking for Aubrey and Kevin Boyd, Monica's boyfriend. Lewis could hear E.D. yelling in the background, "I know Lamar is with some girl. I'm going to kill him. I'm going to kill him." E.D. wanted Lewis to sleep with Aubrey so she could walk in and "catch him."

On December 17, 2006, Aubrey went to Lewis's house. Aubrey had blood on his hand and was confused and shaking. Aubrey said that E.D. "pulled a knife out on him" and that he had hit her.

Yolanda Watson testified that on December 18, 2005, Aubrey stayed at her house after a party at work. The following morning, about 7:00 a.m., E.D. showed up, pushed Watson out of the way, and entered the house. Watson knocked on the door of the bedroom where Aubrey stayed and told him that E.D. was there. E.D. pushed her way in the room, jumped on Aubrey, and began attacking him. E.D. repeatedly struck Aubrey on the back as he walked out of the room. E.D. stopped punching Aubrey and began punching Watson's six-year-old son on the shoulder when the boy told E.D. to be quiet. Watson's teenage daughter got in the middle of them and E.D. began hitting her too.

Watson intervened and she, too, was hit by E.D. Aubrey got E.D. out of the house where she threw a temper tantrum on the ground and then threw things at the door.

Kevin Boyd testified that he once saw E.D. throw a can at Aubrey, hitting him on the face and causing a big knot. On another occasion, Boyd saw E.D. argue with and strike Aubrey in the face with a broomstick as Aubrey held their baby. On yet another occasion, Boyd and Aubrey were getting home from work and encountered E.D. outside the house waiting. E.D. asked why they were gone so long and when Aubrey replied, she slapped him.

Eric Lowe testified that one day he heard Aubrey and E.D. arguing in their house after a burglary had occurred there. As Aubrey began walking down the stairs in the house, E.D. pushed him on the back. Aubrey, however, was able to grab the rail and did not fall.

Terry Roberts testified that one time he received a call from Aubrey asking him to be a witness to what was going on at Aubrey's residence. Roberts could hear E.D. in the background calling Aubrey names and saying she was going to kill Aubrey. Roberts also heard objects breaking in the background.

On another occasion, Roberts was at Aubrey's residence when he saw E.D. throw a can at Aubrey and hit him on the face, causing a golf-ball size bump.

E.D. was once arrested two times in three days for assaulting him. The first arrest occurred after she got the SIM (subscriber information module) card from his cell phone, copied all his contacts onto her phone, and made harassing calls to people he knew. On June 22, 2006, as Aubrey was leaving for work in his car, he got a call from a coworker informing him that E.D. was making harassing calls. He then parked his car, walked in the house, and broke her cell phone. As he walked out the door, E.D. began hitting him. During an ensuing skirmish, E.D. bit his finger and kicked him in his face three times with the heel of her foot. He did not punch her that time. On June 24, 2006, E.D. was again arrested after she kneed Aubrey in the groin. In July 2006, he filed for a restraining order against E.D.

Ryan Newman testified that on June 22, 2006, he was working as police officer for the city of Bakersfield when he responded to a domestic call involving Aubrey and E.D. Aubrey told the officer that he an argument with his live-in girlfriend became physical and she bit him on the hand. E.D. admitted biting Aubrey's hand after he took her cell phone. She also claimed that Aubrey choked her and punched her in the face approximately five times. Newman saw a bite mark on Aubrey and arrested E.D. He did not see any injuries on E.D.'s face or neck.

Yolanda Aragon testified that she arrived home one time and saw E.D. and Aubrey arguing outside their residence. E.D. was pushing Aubrey and trying to hit him; Aubrey was pulling back from her to avoid being hit.

Christian Brett Garrett testified that on December 25, 2005, in the afternoon he heard arguing and screaming outside his home. He looked out the window and saw Aubrey get into a vehicle and E.D. hanging on to one of its doors.

DISCUSSION

Prior to the start of trial, the defense moved to introduce certain coroner records regarding E.D.'s adjudication for the voluntary manslaughter of her sister 16 years earlier, when E.D. was 12 years old. The defense had to get records relating to this adjudication from the coroner because the Solano County Superior Court denied a defense motion to obtain records pertaining to this adjudication. Defense counsel argued that the coroner records were admissible to show E.D.'s propensity for violence and to show Aubrey's state of mind. (Evid. Code, § 1103.) The court ruled that Aubrey could not introduce any evidence regarding this adjudication except under specified circumstances, e.g., if there was an attempt to show that the killing never occurred or if E.D. denied being adjudicated for this offense or claimed that she acted in self-defense. The court also ruled that Aubrey could disclose the adjudication if Aubrey took the stand and testified that he was in fear of his safety because of his knowledge of E.D.'s voluntary manslaughter adjudication.

During the trial, defense counsel again raised the issue, and the court stated that it was allowing the evidence only to show Aubrey's state of mind. During jury instructions, the court charged the jury that it could consider the evidence that E.D. stabbed her sister to death only for the purpose of determining Aubrey's state of mind on December 17, 2006.

Aubrey contends the court erred when it instructed the jury that it could consider the evidence that E.D. killed her sister by stabbing her only on the issue of Aubrey's state of mind. We will find that any error in the court charging the jury with this limiting instruction was harmless.

“Evidence Code section 1103 authorizes the defense in a criminal case to offer evidence of the victim's character to prove his conduct at the time of the charged crime. Consequently, in a prosecution for a homicide or an assaultive crime where self-defense is raised, evidence of the violent character of the victim is admissible to show that the victim was the aggressor. [Citations.]

“As [*People v. Rowland* (1968) 262 Cal.App.2d 790] explained, ‘[b]efore the Evidence Code, the character trait could be shown by reputation evidence, but not by evidence of specific acts of the victim on third persons. [Citations.] It is now permissible under section 1103 of the Evidence Code to prove the aggressive and violent character by specific acts of the victim on third persons. [Citation.]’ [Citation.]” (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446, fns. omitted.)

However, instructional error is not reversible unless it is reasonably probable that the defendant would have received a more favorable result in the absence of the error. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

Here, even assuming the court erred in instructing the jury that it could consider the evidence that E.D. killed her sister only on the issue of how it affected Aubrey's state of mind, the error was harmless. The probative value of E.D.'s adjudication for manslaughter was of dubious relevance to show E.D.'s propensity for violence because it occurred approximately 16 years earlier when E.D. was a child of only 12 years. Further, the jury was aware that E.D. killed her sister because the court allowed the defense to present evidence of this to show how it affected Aubrey's state of mind.

The court also allowed the defense to present evidence of numerous other instances when E.D. had been violent with Aubrey, had threatened him, or acted in a belligerent manner towards him, and the court did not limit the jury's consideration of this other evidence. Many of these instances were not disputed, including the two that Aubrey contended resulted in E.D. being arrested for domestic violence against him.

Moreover, two independent witnesses, Porchia and his son, testified to seeing Aubrey assault E.D. Neither of them, however, testified to seeing E.D. with a knife and no knife was found by the detective who took pictures of the area where the assault occurred. Thus, we conclude that any error in charging the jury with the limiting instruction at issue was harmless.

DISPOSITION

The judgment is affirmed.